SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

H. V. WATKINS, SR., FRED J. LOTTERHOS, AND AUBREY L. GREEN, EXECUTORS OF THE ESTATE OF RICHARD HOWARD GREEN, DECEASED, AND THE R. H. GREEN FOUNDATION, A CORPORATION,

Petitioners,

vs.

EUGENE FLY, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MISSISSIPPI,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court (R. 76, 77) is set forth in Appendix A, hereto; the original opinion of the Circuit Court of Appeals for the Fifth Circuit is set forth in Appendix B, hereto; and the opinion of the Circuit Court of Appeals for the Fifth Circuit on petition for rehearing is set forth in Appendix C, hereto, of the Court's convenience.

II.

Applicable Statutes.

The applicable provisions of the Revenue Act of 1926 are set forth in Appendix D, hereto; and Section 269 of the Mississippi Constitution is set forth in Appendix E, hereto.

III.

Jurisdiction.

Reference is respectfully made to the jurisdictional statement as set forth in the petition for certiorari.

IV.

Statement of the Case.

Reference is respectfully made to subdivision A of the petition for certiorari, headed, "Summary Statement of Matters Involevd and Questions Presented." Supplemental statements will be made in the argument. For the Court's information, copies of the briefs filed in the Circuit Court of Appeals are made available herewith.

V.

Specifications of Errors.

Specification No. 1.

The Circuit Court of Appeals erred in holding that title vested in the heirs at law on the testator's death.

Specification No. 2.

The Circuit Court of Appeals erred in holding that the charitable gifts passed to the charity from the heirs at law and not under the will.

Specification No. 3.

The Circuit Court of Appeals erred in holding that the gift to charity was not testamentary.

Specification No. 4.

The Circuit Court of Appeals erred in holding that the testamentary devise must be disregarded as though not included in the will.

Specification No. 5.

The Circuit Court of Appeals erred in holding that the case was not governed by the line of decisions represented by *Commissioner* v. *First National Bank of Atlanta* (CCA 5th, 1939) 102 F. (2d) 129.

Specification No. 6.

The Circuit Court of Appeals erred in concluding that the tax claim could not be affected by events subsequent to death of testator, contrary to controlling decisions of this Court.

Specification No. 7.

The Circuit Court of Appeals erred in holding that the property passed to the heirs under the Constitutional provision involved on the testator's death.

Specification No. 8.

The Circuit Court of Appeals erred in holding that the decree of the Probate Court was not controlling in tax litigation.

Specification No. 9.

The Circuit Court of Appeals erred in holding that a compromise in the course of administration on the estate of the testator was ineffective.

Specification No. 10.

The Circuit Court of Appeals disregarded the established purpose of the Mississippi Constitutional provision.

Specification No. 11.

The Circuit Court of Appeals erred in affirming the judgment of the District Court and in denying the relief prayed for by petitioners.

VI.

ARGUMENT.

POINT 1.

The purpose of the Constitutional provision under consideration was to benefit the heirs at law and there is no prohibition or policy in Mississippi against the acquisition of real property by charities of the type here involved.

The petitioners' case has for its major premise the proposition that Section 269 of the State Constitution was enacted for the benefit of the heirs at law and hence the benefits of that section were subject to waiver.

There is no policy or prohibition in Mississippi against the acquisition and holding of real property by charities other than religious organizations. It follows that the Constitutional provision is not a mortmain act. *Zollman, American Law of Charities,* pp, 45, 342, 343, and 349. The purpose of the Constitutional provision is stated in *Blackbourn* v. *Tucker,* 72 Miss. 735, 17 So. 737, as follows:

> "Manifestly, the purpose of the constitution is to prevent one who will not be charitable at his own expense from being so at the expense of his heirs at law. * * * The limitation is upon testamentary power."

With reference to the Mississippi statute, *Zollman, American Law of Charities,* p. 45, states:

"Manifestly, the purpose of the constitution is to prevent one who will not be charitable at his own expense from being so at the expense of his heirs at law. One may yet 'sell that he hath and give to the poor,' but he may not keep his grip on his estate until death relaxes his grasp, and then, at the expense of wife and child, devote it to religious uses." (Citing Blackbourn *v.* Tucker, 72 Miss. 735, 17 So. 737.)

A statement as to the purpose of Section 269 of the Constitution, as found in *Blackbourn* v. *Tucker*, supra, was reaffirmed in *Greely* v. *Houston*, (1927) 148 Miss. 799, 114 So. 740, and again in *National Bank of Greece* v. *Savarika*, 167 Miss. 571, 148 So. 649, in which last cited case the court, referring to Sections 269 and 270 of the Constitution, said:

"That provision and the statutes (Code 1930, Sections 3564, 3565) are a limitation upon testamentary disposition, and are designed in extenso to prevent 'One who would not be generous at his own expense from being generous at the expense of his heirs.' Blackbourn *v.* Tucker et al., 72 Miss. 735, 17 So. 737; Hailey *v.* McLaurin's Estate, 112 Miss. 705, 73 So. 727; Maas *v.* Sisters of Mercy of Vicksburg, et al., 135 Miss. 505, 99 So. 468; Greely *v.* Houston, 148 Miss. 799, 114 So. 740."

In the recent case of *Bell* v. *Mississippi Orphans Home*, 192 Miss. 205, 5 So. (2d) 214, the court construed the 1940 amendment to the Constitution. (Chapter 326, Laws of 1940.) The 1940 amendment repealed Section 269 of the Constitution and amended Section 270 to read as follows:

"No person leaving a spouse or child, or descendants of child shall, by will, bequeath or devise more than one-third of his estate to any charitable, religious, educational or civil institutions, to the exclusion of such spouse or child, or descendants of child, and in all cases the will containing such bequest or devise must be executed at least ninety days before the death of the testator, or such bequest or devise shall be void."

A comparison of the 1940 amendment quoted above and the Georgia statute referred to by the Circuit Court of Appeals (Appendix B) demonstrates that they are almost identical, and the court in the *Bell* case expressly adopted the construction of the law as established by the decisions of Georgia. It was held in this case that the statute was for the sole benefit of the heirs at law named therein and, hence, that the limitations prescribed by the statute did not apply where there were no heirs of the type mentioned. This decision thus preserved the view that such provisions are solely for the benefit of the persons named in the statute. It is true that the new statute is somewhat differently worded from the old Constitutional provision, but there is no difference in the purpose and design of the two. It is consistently established and maintained throughout our jurisprudence that there is no public policy against the acquisition of real property by charities other than religious societies and associations.

The conclusion that there is no policy in this state against the acquisition of real estate by charities of a non-religious character is supported by *National Bank of Greece* v. *Savarika*, 167 Miss. 571, 148 So. 649, wherein it is held that Section 269 of the Constitution does not apply to a devise of land to a Mississippi charity where the land is located in another state.

The distinction between gifts to religious institutions and charities without religious connections or purposes is important. As to religious institutions, the state has a declared "mortmain" policy, even where the gift is to be used by the institution for charitable purposes. Thus, *Mississippi Code* 1930, *Section* 4169 provides that, "Any religious society, ecclesiastical body and/or any congregation thereof, may hold and own, at any one place, the following real property, but no other, viz:" and then follows an enumeration of the type of real property that may be owned,

such as a place of worship, a place of residence for its pastor, etc. On the other hand, there is absolutely no restriction whatever as to non-religious charities. Thus, Section 269 of the Constitution might well be construed as a mortmain act insofar as religious bodies are involved, but there being no policy against the acquisition and holding of real estate by charities generally, it cannot be said that the State of Mississippi has any interest in defeating a charitable devise, except as a protection to the heirs at law.

The Mississippi provision as found in the Constitution is of the same general type as exists in a number of other states and almost without exception these statutes have been construed as conferring a benefit upon the individual named therein and not as establishing a policy against the acquisition of properties by charities. Annotation: 37 L. R. A. pp. 324-327, and Zollman, American Law of Charities, pp. 45, 342, 343, and 349. We make particular reference to the case of *Estate of Dwyer,* 159 Cal. 680, 115 Pac. 242, and the comment thereon in *Mead* v. *Welch* (C. C. A. 9th, 1938), 95 F. (2d) 617.

POINT 2.

It was competent for the heirs at law to waive the protection of the Constitutional provision involved and to consent that the property pass under the will to the charity.

Since the constitutional provision here involved was designed for the protection of the property rights of the heirs at law (Point 1, *supra*) it was competent for the heirs to waive the protection, as was done in the case at bar.

The opinion of the Circuit Court of Appeals recognizes that the heirs might waive the benefits that would otherwise have accrued to them, and the rule is stated by the court in the following language:

> "When a constitutional provision is designed for the protection solely of the property rights of the citizen, it

> is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will. (Cooley's Constitutional Limitations, 219.)"

The statement quoted above from the opinion on petition for rehearing is sustained by all of the authorities and it is not weakened by the use of the phrase "null and void" as it appears in Section 269 of the Constitution. The phrase has no particular significance or meaning apart from the context and purpose of the statute. (44 *Words and Phrases*, Permanent Edition, "void" and "voidable".) As observed by this Court in *Weeks* v. *Bridgman*, 159 U. S. 541, 40 L. Ed. 253, quoted in *Toy Toy* v. *Hopkins*, 212 U. S. 542, 53 L. Ed. 644:

> "It is *rarely* that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bac. Abr. Void and Voidable; Ewell *v.* Daggs, 108 U. S. 143 (27:682); Ex parte Lange, 85 U. S. —, 18 Wall. 163 (21:872); State *v.* Richmond, 26 N. H. 232; Anderson *v.* Roberts, 18 Johns. 513, 9 Am. Dec. 235; Pearsoll *v.* Chapin, 44 Pa. 9."

To the same effect, see *In re Validation of Bonds of Clarke County*, 187 Miss. 512, 193 So. 449, wherein it is observed that, "The terms void and voidable are sometimes used interchangeably." Statutes using the term "void" and "utterly void" have been construed to mean "voidable" in the following Mississippi cases: *Elkin Henson Grain Co.* v. *White*, 134 Miss. 203, 98 So. 531; *Skinner Manufacturing Co.* v. *Deposit Guaranty Bank*, 160 Miss. 815, 133 So. 660; *Dayhood* v. *Neely*, 153 Miss. 14, 49 So. 440; *Natalbany Lumber Co.* v. *Countiss*, 134 Miss. 511, 99 So. 262. Numerous others might be cited. This view is in accord with well settled rules of construction. Statutes must be

construed so as to bring them into conformity with the manifest purpose and reasons which lie at their foundation. *Millwood* v. *State*, 190 Miss. 750, 1 So. (2d) 582; *Pattison* v. *Clingan*, 93 Miss. 310, 47 So. 403; *City* v. *Marshall County*, 104 Miss. 752, 61 So. 703; *Smith* v. *Chickasaw County*, 156 Miss. 171, 125 So. 96, Sug. Er. Ov. 156 Miss. 171, 125 So. 705; *Chassanoil* v. *City of Greenwood*, 166 Miss. 848, 148 So. 781, Aff. 291 U. S. 584, 78 L. Ed. 1004, reh. den. 292 U. S. 601, 78 L. Ed. 1464. The construction for which we contend does not violate the letter of the statute, since one of the well recognized technical meanings of the term "void" conveys the idea of something effective when confirmed, but even if it were otherwise, the letter of a statute must give way to its obvious spirit, especially when the terminology is susceptible to more than one meaning. *Ingraham* v. *Speed*, 30 Miss. 410; *New Orleans, J. & G. N. R. Co.* v. *Hemphill*, 35 Miss. 17; *Huber* v. *Freret*, 138 Miss. 238, 103 So. 3; *White* v. *Miller*, 162 Miss. 296, 139 So. 611; *Gandy* v. *Public Service Corp.*, 163 Miss. 187, 140 So. 687.

We refer to the case of *Haggart* v. *Wilczinski* (C. C. A. 5th), 143 F. 22. This was an appeal from the Southern District of Mississippi, and involved the application of Mississippi law. Appellant claimed title through foreclosure of a mortgage as against appellee who claimed through the mortgagor. In former litigation in the Mississippi state courts the Supreme Court had held that the foreclosure sale was "absolutely void." The Circuit Court of Appeals reversed the decision of the court below and overruled a demurrer to the complaint filed by the appellant seeking to substantiate his title to the land. In so doing, the Circuit Court had the following to say with reference to the term "void" and its meaning, this being with special reference to the language of the Mississippi Supreme Court, which was involved in the case:

"The word 'void' is so often used in the sense of 'voidable' as to have almost lost its primary meaning, and, when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. The word, when confined to the effect of the sale and conveyance as a transfer of title, the matter under consideration, was used by the learned Supreme Court with accuracy and technical precision. A purchase by a trustee at his own sale is certainly void as to the beneficiary in the trust. It is void because the seller is not permitted to buy at his own sale. Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076. The word 'void', however, is frequently used even by legal writers and jurists where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. Ewell *v.* Daggs, 108 U. S. 143, 148, 2 Sup. Ct. 408, 27 L. Ed. 682. The distinction between 'void' and 'voidable' in their application to contracts is sometimes one of practical importance. A transaction may be void as to one party, and not as to another. When entire technical accuracy is desired, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever, mere nullities, such, for example, as are against the law, illegal, or criminal, or in contravention of that which the law requires, and therefore incapable of confirmation or ratification. Allis *v.* Billings, 6 Metc. 415, 417, 39 Am. Dec. 744; Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987, 988; Toledo, St. L. & K. C. R. Co. *v.* Continental Trust Co., 95 Fed. 497, 525, 36 C. C. A. 155. The sale by the substituted trustee, while it had no effect on the title, was not a transaction entirely incapable of confirmation or ratification by the parties in interest. The Alliance Trust Company, the beneficiary in the trust, gave credit for the purchase money and held possession under the purchase. In its bill now before the court, in one of its alternative claims, it avers the legality of the sale, thereby expressing a willingness to let the sale stand. Can it be doubted that the sale could be confirmed and the credit

of $35,000 on the mortgages be permitted to remain, if all parties in interest elected to let it stand? A decree ratifying the sale, rendered at the election of all parties in interest, would be the equivalent of a decree of strict foreclosure under the former practice."

Considerable discussion of the term "void" as distinguished from "voidable" was included in the briefs before the Circuit Court of Appeals. The respondent took the position that the term "void" as used in the Constitutional provision rendered the devise to charity utterly meaningless and incapable of confirmation, whereas, petitioners contended that the phrase "null and void" when viewed in the light of the purpose of the Constitutional provision to benefit the heirs meant that the devise was "void" only in the sense of something ineffective until confirmed.

Our position in this connection is supported by the case of *Bell* v. *Mississippi Orphans Home*, 192 Miss. 205, 5 So. (2d) 214. A discussion of this case and the holding of the court therein is found under Point 1 of this brief. The court stated in this case that the Constitutional provision as amended was copied from the laws of Georgia and the courts of that state, as pointed out in the original opinion of the Circuit Court of Appeals in the case at bar, have construed a devise to charity as being voidable in the sense that the gift is effective unless and until rejected by the heirs named in the statute. The court in the *Bell* case expressly adopted the Georgia construction of the statute. The new statute, although differently worded, is substantially the same insofar as the state's policy is concerned, and it is believed that the construction of the Constitutional amendment should apply with equal force to the original Section 269 of the Constitution.

Our construction of the term is sustained by the great and overwhelming weight of authority as shown by the Mississippi decisions and the collection of definitions in

Words and Phrases, cited above. The Circuit Court of Appeals necessarily adopted this view but proceeded to draw a conclusion contrary to the established facts in the record and contrary to the settled law on the subject.

The process of confirmation by the heirs at law in the case at bar began on the death of the testator. As previously pointed out, the heirs at law did not take possession of the real property, nor did they exercise any control thereover or any of the incidents of ownership therein. To the contrary, the executors, as trustees, for the benefit of the charity, took immediate possession of the real property and exercised exclusive control thereover and all of the incidents of ownership therein. For example, within one month after the death of Mr. Green, the executors, under authority of the Probate Court, entered into a contract to rebuild the roof on certain warehouse property included in the residuary clause, at a cost of $3,689.60 (R. 50). Prior to this time, the executors entered into a lease effective November 1, 1936, whereby they had leased the warehouse building for a term of six years (R. 51). The real estate was treated as belonging exclusively to the charity from the date of Mr. Green's death and the heirs at law never sought to exercise any rights in the property whatsoever.

These facts are especially significant since, in Mississippi, real estate is not administered as an asset of the estate unless it develops that the personal property is insufficient to pay the debts of the testator, and real property can be resorted to only for the purpose of paying debts and then only under the authority of the Probate Court and upon certain conditions and limitations. *Code of 1930,* Sections 1643, 1691, 1694, 1695; *Gordon* v. *James,* 86 Miss. 719, 39 So. 18; *Gift* v. *Love,* 164 Miss. 442, 144 So. 562; and *Gidden* v. *Gidden,* 176 Miss. 98, 167 So. 785. The executors as such have no right to control or manage the real estate except to the extent that such authority is conferred on them by

statute for the purpose of paying debts, unless conferred upon them under the terms of the will. *Fidelity & Deposit Company* v. *Doughtry,* 181 Miss. 586, 179 So. 846.

The quitclaim deed was executed on March 4, 1937, or approximately four months after the testator's death (R. 33). But the execution of this formal instrument was simply the culmination of a course of conduct dating from the testator's death which conclusively showed a ratification and confirmation of the devise of the real property to charity by the terms of the testator's will. The effect of the quitclaim is not open to question for it is stated in the agreed stipulation appearing in this record that (R. 73):

> "Said grantors by such quit claim deed *waived any claim of title* and *validated the title* of the real property in the executors who *made claim to it under and pursuant to the provisions of Item XI of the will.* The grantors in said quit claim deed had not made and did not make at any time prior to the execution of said deed any claim to the real estate conveyed thereby, and executed said quit claim deed without any consideration, other than their desire to see the testator's will carried into effect." (Emphasis ours.)

The effect of this instrument as a waiver of claim and validation of title is in accordance with the law of Mississippi as found in *Mississippi Code of 1930,* Section 2125. The quitclaim deed did not necessarily "pass" or "convey" a title; it did estop the heirs from ever asserting a title adverse to the charity. Its effect was to neutralize Section 269 of the Constitution and render the provision for the protection of the heirs ineffective, thus permitting the property to pass under the will.

Point 3.

The holding of the Circuit Court of Appeals that title to the property devised to charity vested in the heirs immediately upon the death of the testator is erroneous as a basis for determining tax deductibility.

The original opinion of the Circuit Court of Appeals was made to turn upon the statement that, "Title to the property attempted to be devised to charity would vest immediately upon the death of the testator," and this was made the basis of the conclusion that the property passed to the charity from the heirs and not under the will. We think that this conclusion depends upon considerations wholly unreal and illusory.

The problem must of necessity be viewed in the light of the facts as developed on this record, and conclusions must be drawn from those facts that are practical and real. The stubborn facts are that the heirs at law declined to accept possession of the property and declined to exercise any of the rights which collectively are called a "title" and declined to exercise any of the incidents of ownership in the property devised to charity. The executors, as trustees, took immediate possession of the property, claiming under the will, and this was done and the property was held and controlled by the trustees with the acquiescence of the heirs at law. This situation materialized, to all practical intents and purposes, at the instant of Mr. Green's death. Therefore, we say that title did not vest in the heirs upon the testator's death, at least in any significant sense of the word.

The Constitutional provision is that the "heir at law shall take" the same property. The law did *not* provide that "title shall vest" in the heirs at law and, we say, this language cannot be read into the law by the courts. The language employed by the Constitutional section contem-

plated some act of "taking" by the heirs if they chose to exercise the rights conferred upon them. It may be that the taking can be accomplished by the heirs without affirmatively asserting their rights. But, regardless of how the taking is evidenced, whether by an affirmative assertion of right or a negative failure to reject or disclaim ownership by deed or conduct, the heirs must take the property if they are to inherit against the charity.

Obviously, the Constitutional provision is not designed to force the heirs to take against their will, and this being so, they may accept or reject the property as they wish. No property ever passes to an individual, regardless of the form employed to convey the same, whether by will, deed, statute or inheritance, unless he accepts the property. Since the heirs did not accept the benefits of the Constitutional provision, the property did not pass to them.

The opinion and conclusion of the Circuit Court of Appeals conflicts with the elementary proposition just stated and is in direct conflict with this Court's opinion in *Helvering* v. *Grinnell*, 294 U. S. 153, 79 L. Ed. 825.

This case involved a question under Section 302(f) of the Revenue Act of 1926. One John O. Stone died leaving a will by which he created for the benefit of his daughter, Annie Stone, a trust fund, the income from which was to be paid to her during her life. The will provided that upon her death her share of the estate should go to such persons as she might appoint by last will and testament, but, in default of such appointment, her share should go and belong to her children, if any, or in default of issue to her next of kin. Annie Stone died without issue and, by her will, directed that her share of the estate go to her two sisters. These two sisters were the next of kin of Annie Stone and hence beneficiaries under the will of John O. Stone, in the absence of an exercise of the power.

After the death of Annie Stone, the two sisters in writing renounced their right to receive the property under the will of Annie Stone and by this writing stated their election to take under the will of John O. Stone, thus avoiding several thousand dollars in estate taxes. The question was whether or not the two sisters had a right to reject title under the will of Annie Stone.

The court held that the two beneficiaries under the will of Annie Stone had a right to reject title under that will and take title from the other source, so that the estate tax did not apply. In so holding, the court said:

> "But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative.
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> " 'An appointee under a power,' the court continued, 'has the right of election, the same as a grantee under a deed. * * * He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where it was before.' "

This case necessarily establishes the proposition that property does not "pass" on death until accepted under the will or by inheritance. The property of a decedent never passes to the person entitled thereto if rejected prior to acceptance. In the case at bar, the heirs at law were entitled to receive the real property in question by inheritance despite the will devising the property to charity. However, they never accepted the property, in that the executors took possession and control of the property upon their qualification as executors, and thereafter exercised exclusive control thereover. The heirs never asserted the invalidity of the devise to charity and never sought to take possession of the property or exercise any rights therein or control thereover. Shortly after the death of the testator, they rejected in writing the title which they would otherwise have been entitled to. Therefore, we perceive no difference in principle between the case at bar and *Helvering* v. *Grinnell, supra.*

There is no apparent difference between a right to inherit by statute and a right to take as a devisee under a will. Either right may be rejected, and the Supreme Court of Mississippi has held that:

> "A devise or bequest does not become effective until accepted by the devisee or legatee, who has the right to accept or decline it as he may desire; and, when a devisee or legatee refuses to accept a devise or legacy, the property devised or bequeathed to him will be dealt with as if the devise or legacy had not been made." *Greely v. Houston,* 148 Miss. 799, 114 So. 740.

The real question, as we see it, is not to be determined with reference to the vesting of a bare legal title. The Revenue Act does not tax a "title" but taxes the value of property passing to individuals, and so the real question is whether or not the property passed to the heirs at law. It seems clear that the property never passed to the heirs since

they did not accept and expressly rejected it. "Title" is merely a convenient term to designate assertable legal rights. If these rights are not asserted and are rejected, "title" means nothing—it falls with the rights which have been rejected. One cannot accept a title and at the same time reject the rights which go to make it up, for this would be a contradiction.

To say that title vested in the heirs on the death of the testator and to make this a basis for decision is to employ a mere play on words—a fiction without foundation in point of actual fact—as a consideration for the determination of substantial rights. "Taxation," as it many times has been said, "is eminently practical." The deductibility "must be determined by actual results brought about by the death rather than by consideration of artificial rules which delimit the title." *Tyler* v. *United States,* 281 U. S. 497, 74 L. Ed. 991; *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 74 L. Ed. 371. It was the purpose of Congress to encourage testators to make charitable gifts. *Burdick* v. *Commissioner,* (C. C. A. 2nd, 1941) 117 F. (2d) 972, Certiorari denied 314 U. S. 63; and *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 68 L. Ed. 558. An exemption in aid of charity should not depend on considerations wholly unreal and illusory. *City Bank Farmers' Trust Co.* v. *U. S.* (C. C. A. 2nd), 74 F. (2d) 692.

Of course, if there had been no heirs at law, no one would question the right of the charity, since there would have been no one to exercise the rights under the Constitution, and since by the very terms of the Constitutional provision, no one could take the property against the charity except the heirs. *Expressio unius est exclusio alterius.* 25 R. C. L. 981, Section 229; *State ex rel. Whall* v. *Saenger Theatres Corporation,* 190 Miss. 391, 200 So. 442. We can perceive no difference in the situation where the charity takes possession as owner and the heirs decline to take possession,

decline to assert ownership, decline to exercise control, and formally reject and disclaim the title.

The property passed under the will. The provision is that the devise shall be "null and void, and the heir at law shall take." These words must be construed together if the sense and spirit of the law is to be maintained. Since the heirs at law are the only ones named, they are the only persons who may take against the charity. Since the heirs may not be forced to take against their will, they may disclaim and reject title and possession. These things being self-evident, it follows that where the heirs disclaim, the devise is not "null and void." The devise is designated as "null and void" in order that the benefits conferred on the heirs may be given full effect if the heirs choose to accept those benefits. If they decline to accept, as in the case at bar, then the reason for the designation of the devise as "null and void" no longer exists and the devise is effective.

We cannot perceive how the property could have passed to the heirs in any real or practical sense where they refuse to accept the same, both by their conduct and a formal instrument of writing, and where the trustees, claiming under the will and with the acquiescence of the heirs, take possession and control for the benefit of the charity. Except for the will, there would have been no trustees and the charity would have received nothing. Therefore, to say that the property did not pass by the will is to substitute form for substance.

The principle involved is stated by the court in *Greely* v. *Houston,* 148 Miss. 799, 114 So. 740, 742, as follows:

> "A devise or bequest does not become effective until accepted by the devisee or legatee, who has the right to accept or decline it as he may desire; and, when a devisee or legatee refuses to accept a devise or legacy, the property devised or bequeathed to him will be dealt with as if the devise or legacy had not been made."

Thus, when the heirs in the case at bar declined to accept the property which the Constitutional section gave them the right to inherit, it was as though no heirs had survived the testator to accept the benefits from the Constitutional provision.

There are other sufficient reasons why the phrase as used in the Constitution that, "The heir at law shall take the same property so devised or bequeathed, as though no testamentary disposition had been made," should not be held to adversely affect petitioners' claim. This language was used to assure that the heirs at law and no one else would receive the benefits of the Constitutional provision. Except for this provision, a question might have arisen as to whether a residuary legatee would inherit the property devised to charity or whether the property would pass to the heir at law. It was never intended by the quoted phrase to convey any idea other than that the Constitutional provision was for the sole protection and benefit of the heirs at law. The quoted phrase did not define the term "void" as used in the Constitutional provision so as to preclude the conclusion that the devise to charity might be made effective by a waiver from the heirs at law. If it be said that the courts of Mississippi have not so construed the provision, we reply that there is nothing to be found in the Mississippi decisions to the contrary.

POINT 4.

The tax claim did not accrue upon death of the testator in the sense that no subsequent act of the heirs could defeat or affect that claim.

The decision of the Circuit Court of Appeals overlooks or disregards the rule established by *Lyeth* v. *Hoey*, 305 U. S. 188, 83 L. Ed. 119, 119 A. L. R. 410; *Helvering* v. *Grinnell*, 294 U. S. 153, 79 L. Ed. 825; and *Helvering* v. *Safe Deposit*

& Trust Company of Baltimore, 316 U. S. 56, 86 L. Ed. 1266, 139 A. L. R. 1513. These decisions clearly recognize and establish the proposition that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate, under the Revenue Act of 1926.

In *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 316 U. S. 56, 86 L. Ed. 1266, 139 A. L. R. 1513, the court had under consideration the question whether or not taxability under Section 302 of the Revenue Act of 1926 could be affected by events subsequent to the decedent's death, the more precise question being whether or not such taxability could be affected by a compromise reached in the course of the administration of an estate. In answering the questions in the affirmative, the court discussed the case of *Lyeth* v. *Hoey*, 305 U. S. 188, 83 L. Ed. 119, 119 A. L. R. 410, and *Helvering* v. *Grinnell*, 294 U. S. 153, 79 L. Ed. 825, as follows:

> "The Lyeth Case, like the one now before us, came to this Court after a compromise settlement. An heir of the decedent had contested the validity of the decedent's will in which no provision had been made for him. The heir and the devisees and legatees under the will entered into a compromise providing that the will be probated and that a specific sum be paid to the heir. We held that the money the heir received pursuant to the compromise should be treated, with respect to his tax liability under the federal income tax statute, as if acquired 'by inheritance' for the reason that it was possible for him to receive it only 'because of his standing as an heir and of his claim in that capacity.'
>
> "The claim of the decedent's brother and sisters here, so far as based on the validity of the purported appointment, had its roots, like the claimed invalidity of the will in the Lyeth Case, in an issue never decided in litigation. If it had been litigated to final judgment by a competent tribunal and the brother and sisters

had succeeded in establishing the validity of the exercise of the power, the inclusion in the decedent's gross estate of what they would have received as appointees, pursuant to Section 302(f), could not seriously be questioned. In the Lyeth Case we said that 'the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound.' There is no less reason for the same conclusion here.

"*The respondents contend that the principle of the Lyeth Case, announced by the Court with respect to income tax liability, should not be controlling where, as here, the question is one of estate tax liability. It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise preceding the receipt of income in connection with an income tax; but that a compromise occurring after the decedent's death, which is the 'taxable event' under an estate tax, should not be considered. Whatever may be the general rule in this respect, this Court has clearly recognized, in Helvering* v. *Grinnell, 294 U.S. 153, 79 L. Ed. 825, 55 S. Ct. 354, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Section 302(f).* In that case the decedent had exercised a general testamentary power of appointment, an act which under Section 302(f) brings the property subject to the power within the gross estate. The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to place the property subject to the power outside the scope of Section 302(f)." (Emphasis ours.)

In the opinion on petition for rehearing, the decision in the case at bar was planted squarely upon the proposition that the tax claim of the government accrued upon the

death of the testator and that no subsequent act of the heirs could invalidate that claim. The exact opposite of this statement is established in *Helvering* v. *Safe Deposit & Trust Company, supra.* If a devisee is permitted to reject a testamentary gift and decline to accept title thereunder, as in *Lyeth* v. *Hoey, supra,* and if a tax claim may be wholly or partially defeated by a compromise among beneficiaries, as in *Helvering* v. *Safe Deposit & Trust Co.,* it is difficult to perceive why the heirs in the instant case should not be permitted to reject title and validate the devise to charity, especially where, as here, the rejection dated from death and its formal evidence was executed before the tax return was made.

The Circuit Court of Appeals observes by way of illustration that if the heirs had executed a mortgage on this property, the rights of the mortgagee, like those of the Collector, would have become fixed and the subsequent waiver by the heirs would not have affected those rights. In the hypothetical case referred to, the heirs, by the execution of a mortgage, would have affirmatively accepted title to the property and would have asserted their rights therein. This would have amounted to an election to exercise their rights under the Constitutional provision and, of course, no subsequent waiver could thereafter affect the mortgage under the circumstances. It is quite apparent, therefore, that the illustration has no application to the case at bar.

It is difficult to see the basis for the conclusion that the tax claim accrued instantly upon the testator's death except by reference to a technical legal fiction of title. But when the cloak of form is laid aside, the fact remains that any bare legal title which may have "vested in the heirs" was devoid of substance in point of actual fact, in that the heirs did not take possession or assume control but, by their conduct and affirmative acts, rejected the title and any benefits

that might otherwise have accrued to them under the Constitutional provision.

POINT 5.

There is no real distinction between a devise which is said to be effective until renounced and one which is said to be ineffective until confirmed. The devise to charity in the case at bar is not uncertain to that degree recognized as defeating a tax deduction.

The decision of the Circuit Court of Appeals is in conflict with *Commissioner of Internal Revenue* v. *First National Bank of Atlanta*, (C. C. A. 5th, 1939), 102 F. (2d) 129; *Humphrey* v. *Millard*, (C. C. A. 2nd, 1935), 79 F. (2d) 107; *Mead* v. *Welch*, (C. C. A. 9th, 1938), 95 F. (2d) 617; and *Dimock* v. *Corwin*, (C. C. A. 2nd, 1938), 99 F. (2d) 799, affirmed in 306 U. S. 363, 83 L. Ed. 763.

All of the cited cases involved a devise to charity under a last will and testament. In each case, a statute existed declaring a devise to charity under certain circumstances to be "void". The Georgia statute, quoted in the original opinion in the instant case and involved in *Commissioner of Internal Revenue* v. *First National Bank of Atlanta*, *supra*, (Title 113-107, Ga. Code Ann., Sec. 3851) is typical. It provides as follows:

> "No person leaving a wife or child, or descendants of child, shall, by will devise more than one-third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise must be executed at least ninety days before the death of the testator, or such devise shall be void."

The California statute is discussed in *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242, and is even more closely akin to the Mississippi provision. The statute (Section 1313), as quoted in the *Dwyer* case, provides that:

"No devise or bequest of any estate, real or personal, to any charitable or benevolent society or corporation, or to any person or persons, in trust for charitable uses, shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and further declaring that all disposition of property contrary thereto *shall be void and go to the residuary legatees, devisees, next of kin, or heirs according to law.*" (Emphasis ours.)

The California statute was involved in the case of *Mead v. Welch, supra,* wherein the court held that the heirs might waive the benefits of the statute in favor of a charity and holding further that the California act was not a mortmain statute but its purpose was to prevent injustice to those persons who might benefit from the testator's bounty. New York and Ohio have similar statutes and the decisions from these states sustain our position. *Trustees of Amherst College* v. *Ritche,* 151 N. Y. 282, 37 L. R. A. 305; *Thomas* v. *Board of Trustees (Ohio),* 70 N. E. 896. The Supreme Court of Mississippi has stated that it would follow the Georgia decisions in construing a similar statute to that of Georgia. *Bell* v. *Mississippi Orphans Home,* 192 Miss. 205, 5 So. (2d) 214. A pertinent discussion of these statutes is found in the annotation to the New York case, 37 L. R. A. 324, *et seq.*

All of the Federal cases cited above hold that where the persons named in the respective statutes waive their rights the property passes to the charity and a tax deduction is allowable under the Revenue Act of 1926. The Circuit Court of Appeals in the case at bar sought to distinguish this line of cases, as represented by its own decision of *Commissioner* v. *First National Bank,* by saying that the statute of Georgia had been construed by the state court and that the term "void" as used therein had been held to mean "voidable". In other words, the devise or bequest in Georgia was valid until renounced by the heirs mentioned in the statute, whereas, the devise to charity in the case at bar is said to be ineffective until ratified or confirmed.

To distinguish the instant case, the Circuit Court of Appeals emphasized the phrase in the Mississippi Constitution that, "The heir at law shall take the same property as though no testamentary disposition had been made."

In view of the announcement of this Court in *Lyeth* v. *Hoey, supra,* this brief pp. —, construed in the light of the facts presented on this record, it appears that the quoted phrase relied upon by the Circuit Court of Appeals has no significance, in that the heirs could not be forced to accept the property against their will. The only possible effect of the quoted phrase is to justify a conclusion that a devise to charity in Mississippi is ineffective until confirmed or ratified by the conduct or other act of the heirs at law.

Thus, we have a single point of difference between the cited cases and the case at bar, which, however, does not, we submit, amount to a distinction.

We have previously discussed the self-evident proposition that substantial rights in the case at bar are not to be determined by any conception of the vesting of bare legal title in the heirs at law. The remaining question would seem to be whether or not the devise to charity, in view of the admitted facts, is sufficiently certain to be made the basis of a tax deduction.

In his brief before the Circuit Court of Appeals, respondent insisted that the gift to charity, to be deductible, must at the time of decedent's death be definite, certain of vesting, and valid, citing in support of this statement *Humes* v. *United States,* 276 U. S. 487; *Davison* v. *Commissioner,* 81 F. (2d) 16; *Knoern's Child* v. *Commissioner,* 97 F. (2d) 213; and *Gammons* v. *Hassett,* 121 F. (2d) 229; to which argument, we answered that as to the matter of definiteness and certainty of bequests required by the federal statutes, such requirement relates to the "intent of the testator as manifested by the terms of the will. It is not affected by the

possibility of contest and defeat of the will, or of any provision in it." *Commissioner of Internal Revenue* v. *First National Bank of Atlanta*, (C. C. A. 5th, 1939) 102 F. (2d) 129.

In *Ithaca Trust Company* v. *United States*, 279 U. S. 151, 73 L. Ed. 647, it is recognized that there are varying degrees of uncertainty, and it was held that if a gift is by its terms effective and only an improbable diminution in funds available to pay it creates the contingency, it is not too uncertain to be treated as absolute for the purposes of deduction.

In *Burdick* v. *Commissioner of Internal Revenue*, (C. C. A. 2nd, 1941) 117 F. (2d) 972, Certiorari Denied 314 U. S. 63, the court enters into a discussion of the varying degrees of uncertainty which may or may not defeat a tax deduction. After reference to the case of *Ithaca Trust Company* v. *United States, supra*, the following rule is deduced from that case and from a number of the decisions cited in the first paragraph under this point of our brief. The court said:

> "So, too, where the testamentary gift is absolute in terms in so far as the testator could make it, and uncertain only in the sense that the decedent's will in that respect is subject to limitations beyond his control, the deduction is allowable when it becomes certain that the bequest is valid. Humphrey *v.* Millard, 2 Cir., 79 F. 2d 107; Dimock *v.* Corwin, 2 Cir., 99 F. 2d 799; Commissioner *v.* First Natl. Bank, 5 Cir., 102 F. 2d 129; T. R. 80; Art. 47, Par. 1."

Further comparing the cases first cited under this point, it is impossible to perceive any real difference between a gift which is valid until renounced and one which is ineffective until confirmed. In both instances, the testamentary gift is absolute in terms insofar as the testator could make it. In both instances, the will certainly, clearly and ab-

solutely provides for the gift. In both instances, the enjoyment of the gift by the charity is subject to the absolute choice and election of the heirs. In one case, the heirs have an unrestricted right to renounce the will and take the property as though no testamentary disposition had been made; and in the other, the heirs have the unrestricted right to take, without affirmative renunciation, if they choose to do so, as though no testamentary disposition had been made. In neither instance may the property be forced upon the heir against his will. In both instances, the heir may choose not to take, in order that the will of the testator may be carried into effect. The heir has no greater right in one case than in another, in that his right to take, if he chooses, is unlimited and unrestricted.

Therefore, it cannot be said in the case at bar that the gift to charity was too uncertain to be deductible, without, at the same time, repudiating and over-ruling the decisions cited above, including *Ithaca Trust Company* v. *United States, supra.*

The only uncertainty in any of the cases lies in the fact, and the one fact only, that the decedent's will, in respect to the devise to charity, is subject to limitations beyond the testator's control. In such instances, as pointed out in *Burdick* v. *Commissioner, supra,* the deduction is allowable when it becomes certain that the bequest is valid. In the case at bar, it became certain that the devise was valid almost instantly upon the testator's death and when the executors, as trustees, took possession of the property with the acquiescence of the heirs at law. The passing of the property to the charity was further made certain by execution of the formal instrument of quitclaim, which served to evidence the intention and prior conduct of the heirs in rejecting the title in favor of the charity and validating the title in the trustees for its benefit.

The case of *Burdick* v. *Commissioner, supra,* refers to the regulations of the Commisisoner in Article 47, Paragraph 1, T. R. 80. This regulation reads as follows:

> "If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.
>
> "If the legatee, devisee, donee or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The first paragraph of the regulation has to do with conditions precedent. If it be said that the devise to charity was dependent upon confirmation by the heirs at law, we reply that this confirmation took place on or immediately after the testator's death and was further evidenced by the instrument of quitclaim four months thereafter and prior to the filing of the tax return in December, 1937. Whatever act was necessary from the standpoint of the heirs was performed and the event occurred and this is the only condition referred to in the regulations to an allowance of the tax deduction. The second paragraph of the quoted regulation has to do with a power to divert the property expressed by the terms of the will itself. Such was the nature of the situation presented in *Burdick* v. *Commissioner, supra,* wherein the testator made the effectiveness of the bequests wholly dependent upon the action to be taken by two persons under a power they were free to exercise or not. The second paragraph of the regulations also applies in a case where the will making bequests to charities, permits one of the

devisees to invade the corpus of the trust to the extent that he might at any time, and from time to time, need or desire. *Gammons* v. *Hassett,* 121 F. (2d) 229; Certiorari Denied, 314 U. S. 673. Other similar examples might be cited but the circumstances in these cases, to which the second paragraph of regulation 80 applies, are altogether different from those in the case at bar.

It may also be observed that the facts as developed on this record demonstrate that it was at all times highly improbable that the heirs would act in any other manner than they actually did act with reference to this charitable devise, and the principle as announced in *Ithaca Trust Company* v. *United States, supra,* dealing with an improbable diminution in funds would seem to be applicable. There was only a bare possibility that the gift in the case at bar might be frustrated and these possibilities were certainly beyond the testator's control. He assumed, however, that his will would be carried out and, as it developed, he was amply justified in that assumption. It seems fairly and clearly established from the authority referred to that the possibility of frustration by action of the heirs under independent statutory right does not create that degree of uncertainty which justifies a disallowance of the tax deduction.

The courts of Mississippi have not construed the Constitutional provision as to its effect on testamentary gifts except to sustain the right of an heir to take the property in will contests where the heir is found affirmatively asserting a claim. The courts of this State have not dealt with the problem at hand. The Federal law governs, in any event, as to the construction and application of the Federal tax statute. The Federal law sustains the deductibility in the case at bar.

The Congressional intent was to encourage a testator to provide for charities and to prefer charity gifts to estate

taxes. Based upon a review and analysis of the authorities generally, it may confidently be stated that when a testator, thus encouraged, does all in his power by directing a transfer of property to charity in terms both definite and mandatory, the mere possibility that an heir, exercising a power arising dehors the will and beyond the testator's control, may elect to defeat the will in this respect will not prevent the tax deduction which Congress intended as a reward to the testator for his charitable generosity. Congress intended the deduction to apply uniformly and universally as an encouragement to testators to be charitable. The decision of the Circuit Court of Appeals would deny the application of the tax deduction to charitable gifts in Mississippi and thus frustrate the Congressional intent.

POINT 6.

A compromise was made during the course of administration on the estate, and the decree of the Probate Court adjudging that the property pass to the charity under the testator's will is controlling for tax purposes.

We have referred to the facts in our petition for certiorari. It appears that the Probate Court entered a decree by which it was ordered that the property in question pass to the charity under the last will and testament of Mr. Green. True, this decree was entered after the execution of the quitclaim deed by the heirs at law, but, nevertheless, all parties were before the court and the decree amounts to an adjudication that the devise to charity was valid and that the charity took the property under the will. A doubt arose, and it is immaterial that this doubt was resolved by agreement among the interested parties. The decree based upon such agreement is binding in tax matters. The contrary conclusion by the Circuit Court of Appeals is in direct conflict with *Freuler* v. *Helvering*, 291 U. S. 35, 78 L. Ed. 634;

Uterhart v. *United States,* 240 U. S. 598, 60 L. Ed. 819; and *Blair* v. *Commissioner,* 300 U. S. 5, 81 L. Ed. 465; holding that the decree of a trial court having jurisdiction over the subject matter and the parties, until reversed or over-ruled, establishes property rights and is controlling in tax litigation involving the same subject matter. The conclusion also conflicts with *Helvering* v. *Grinnell,* 294 U. S. 153, 79 L. Ed. 825; *Lyeth* v. *Hoey,* 305 U. S. 188, 83 L. Ed. 119, 119 A. L. R. 410; and *Helvering* v. *Safe Deposit & Trust Company,* 316 U. S. 56, 86 L. Ed. 1266, 139 A. L. R. 1513; holding that a compromise made in the course of the administration will be given effect as the established basis for taxation.

Conclusion.

Wherefore, petitioners pray that a writ of certiorari issue in this case and that the action of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed and the tax refund contended for allowed.

Respectfully submitted,

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